Dunham's Athleisure Corporation *and* Local No. 51, International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 7–RC–19736

May 24, 1993

DECISION AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held February 6 and 8, 1992, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 64 for and 36 against the Petitioner, with 40 challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, and has decided to adopt the hearing officer's findings and recommendations,[1] except with regard to the challenge to the ballot of employee Jeff Romain.

1. Romain's ballot was challenged by the Board agent on the basis that he voted during the incorrect voting period. It is undisputed that the parties agreed in a rider to their Stipulated Election Agreement to conduct two voting sessions—one on Thursday, February 6, 1992, for eligible voters working the weekday shift, and a second session on Saturday, February 8, 1992, for eligible voters scheduled to work the Saturday/Sunday shift. Both the rider and an addendum to the official notice of election posted at the Employer's facility stated:

> It is understood that the Saturday voting period will be reserved only for those eligible voters who work the Saturday/Sunday work shift. All other voters will be challenged by the Board Agent. It is understood that the Employer will provide a separate voter list for the Saturday voting period. Eligible voters not working the Saturday/Sunday work shift shall vote during the Thursday voting period.

Although not scheduled to work the Saturday/-Sunday shift, Romain attempted to vote during the Saturday voting session. His ballot was challenged by the Board agent. At the hearing, the parties stipulated that Romain voted on the wrong day and that his ballot should not be counted. The parties also stipulated that Romain was employed by the Employer on the election date and eligibility date, and that he performed bargaining unit work.

The hearing officer refused to honor the parties' stipulation to sustain the challenge to Romain's ballot and found Romain to be an eligible voter. The hearing officer relied on *Vent Control, Inc. of Ohio*, 126 NLRB 1134, 1135 (1960), in which the Board refused to honor the parties' stipulation to include an individual in the unit when the record revealed that he was a supervisor as defined in the Act. The hearing officer noted that Romain was included on the master eligibility list and, although the election arrangements provided for multiple voting sessions, nothing in the election agreements per se indicated that an employee would be denied the right to vote because he or she cast a ballot at the wrong time.

We disagree with the hearing officer. Unlike in *Vent Control*, the parties' stipulation here to sustain the challenge to Romain's ballot is supported by record evidence and does not contravene any statutory provision or established Board policy. The parties' Stipulated Election Agreement plainly states that only eligible voters working the weekend shift are permitted to vote on Saturday and that all other eligible voters shall vote on Thursday. These voting arrangements were clearly communicated to the voters in the addendum to the notice of election. Romain failed to vote during his scheduled voting period on Thursday through no fault of any party. Under these circumstances, we will honor the parties' election agreement and their stipulation at the hearing to sustain the challenge to Romain's ballot.[2]

2. The ballots of employees Michael Hannigan and Donald McCormick were challenged by the Petitioner on the basis that they are ''co-op students,'' a classification specifically excluded from the unit. At the hearing, however, the parties stipulated to the exclusion of Hannigan and McCormick on another ground, i.e., that they are ''casual employees'' who do not work a sufficient number of hours to share a community of interest with the unit employees. On her review of the evidence, the hearing officer concluded that the stipulation was not supported by the record and that, in fact, these two employees worked as many hours as other regular part-time employees included in the unit. Accordingly, the hearing officer rejected the parties' stipulation and found that Hannigan and McCormick are eligible voters.

Contrary to our dissenting colleague, we find that the hearing officer's rejection of the stipulation is in

[1] In the absence of exceptions, we adopt pro forma the hearing officer's recommendations that the challenges to the ballots of Michael Heishman and LaShanna Thurman be sustained, and that the challenges to the ballots of Derek Badrak, Rosemary Chudick, Kim Cinco, Jennifer Courter, Jennifer Florkowski, Matthew Giertych, Anthony Guziel, Mary Heimiller, Michael Highsmith, Marlow Horton, Lori LaFleur, Amy Matusz, Latrice McCoy, Karyn Nagy, John Notaro, Jeffrey Oltersdorf, Jennifer Reilly, Maryka Richards, David Riemenschneider, Nyna Springer, Jeffrey Stewart, Craig Wilsher, Mary Zdunowski, Michael Moore, Timothy Woodhull, Chris Korhonen, John Pepera, Saundra Halliwell, Alice Pickhardt, Melissa Schrader, Denise Koss, and Jeff Koras be overruled.

[2] Member Devaney would overrule the challenge to Romain's ballot for the reasons set forth by the hearing officer.

accordance with Board precedent. More than 30 years ago, the Board stated that ''[i]n the interest of expeditious handling of representation cases in general, the Board has a well-established policy of holding parties to a stipulation . . . which on its face and on the basis of the facts developed at the hearing does not contravene any Board policy or statutory proscription.'' *Cruis Along Boats*, 128 NLRB 1019, 1020 (1960). As our dissenting colleague concedes, here ''the facts developed at the hearing'' show that Hannigan and McCormick worked approximately the same number of hours as other part-time employees found to be eligible to vote in the election. In these circumstances, to accept the parties' stipulation ''would contravene established Board policy towards regular part-time employees.'' *Cabrillo Lanes*, 202 NLRB 921, 923 fn. 12 (1973) (Board rejected an employer-union agreement to exclude three employees where the record showed that they, like two other employees, were eligible to vote as regular part-time employees).

Unlike our dissenting colleague, we are unwilling to overlook the evidence in the record establishing that Hannigan and McCormick are regular part-time employees and rely instead on sheer speculation that evidence outside the record ''may'' exist ''suggesting'' that they are casual employees.[3] In sum, while we share our dissenting colleague's belief in the importance of stipulations in the Board's election procedures, we are not willing to go so far as to knowingly allow eligible regular part-time employees to be disenfranchised by the parties' unfounded stipulations. Accordingly, we adopt the hearing officer's recommendation that the challenges to the ballots of Hannigan and McCormick be overruled.

3. The hearing officer found that Jennifer Geach and Kathleen White are ineligible to vote because they are office clerical employees, a classification specifically excluded from the stipulated unit. Geach is primarily responsible for recording hours worked into the computer system, compiling a timekeeping report, disbursing supplies, greeting suppliers and vendors, taking telephone messages, receiving and delivering mail, and typing general correspondence and memos for management. White is responsible for maintaining time records, issuing reports from this information, transmitting payroll documents to corporate headquarters, administering benefits, and processing employee requests for vacations, leaves of absence, and schedule changes.

The hearing officer found that although Geach and White are ''sporadically'' called on to perform work in the warehouse such as recording annual inventory, their primary duties are not related to the production process or integrated with and necessary to the smooth functioning of the warehouse. She noted that clerical employees such as Geach and White who are responsible for general office operations, including billing, payroll, phone, mail, and are not involved in the order-filling process, are customarily found to be office clericals and are not included in warehouse units.

In its exceptions, the Employer contends that the hearing officer's exclusion of Geach and White from the unit is erroneous because they are plant clericals who spend approximately 50 percent of their time maintaining time records on hourly associates, citing *J. Ray McDermott & Co*., 240 NLRB 864, 869 (1979). The Employer asserts that in performing their timekeeping functions, these employees must resolve any discrepancies with the hourly associates. The Employer further contends that Geach's preparation of bills of lading constitutes participation in the order-filling process.

Contrary to the Employer's assertion, White credibly testified that she spends 100 percent of her time performing paperwork and timekeeping functions in the front office area. Geach also testified that in typing the bills of lading, she describes every shipment generically as ''assorted sporting goods,'' regardless of the specific items contained in the shipment. Thus, this task does not require her to enter the warehouse or seek information from warehouse employees. The limited contact that Geach and White have with the warehouse employees distinguishes this case from *J. Ray McDermott & Co*., in which the plant clericals spent 75 percent of their time in the field offices where they worked directly or indirectly with production employees, including the resolution of timekeeping mistakes, taking calls from employees who are not coming to work, billing customers for rental work, and meeting with newly hired and fired employees. Accordingly, we adopt the hearing officer's recommendation that the challenges to the ballots of Geach and White be sustained.

DIRECTION

The Regional Director for Region 7 shall, within 14 days from the date of this decision, open and count the ballots of Michael Hannigan, Donald McCormick, Derek Badrak, Rosemary Chudick, Kim Cinco, Jennifer Courter, Jennifer Florkowski, Matthew Giertych, Anthony Guziel, Mary Heimiller, Michael Highsmith, Marlow Horton, Lori LaFleur, Amy Matusz, Latrice McCoy, Karyn Nagy, John Notaro, Jeffrey Oltersdorf,

[3] Our dissenting colleague also claims that the parties' agreement at the hearing may have led them to refrain from presenting further evidence concerning the status of Hannigan and McCormick. However, inasmuch as the Employer makes no such argument in its brief, we do not regard our dissenting colleague's contention as properly before us for consideration. Compare *Red Lion*, 301 NLRB 33 (1991), in which our dissenting colleague participated, where the Board affirmed a hearing officer's rejection of a stipulation that had no factual basis, but in view of the union's argument that it had been denied ''due process,'' permitted the parties to proffer supplemental evidence on the eligibility of the voters in question.

Jennifer Reilly, Maryka Richards, David Riemenschneider, Nyna Springer, Jeffrey Stewart, Craig Wilsher, Mary Zdunowski, Michael Moore, Timothy Woodhull, Chris Korhonen, John Pepera, Saundra Halliwell, Alice Pickhardt, Melissa Schrader, Denise Koss, and Jeff Koras. The Regional Director shall prepare, issue, and serve on the parties a revised tally of ballots and shall take further appropriate action.[4]

MEMBER OVIATT, concurring in part and dissenting in part.

I would honor all the parties' stipulations here regarding voter eligibility. In this case, there were a significant number of challenged ballots. To reduce the issues to be litigated, at the hearing the parties stipulated that voters Michael Hannigan and Donald McCormick should be excluded as casual employees and that voter Jeff Romain should be excluded because he did not vote during the voting period specified for employees on his shift. Despite the stipulation, the hearing officer found that the evidence supported the inclusion of Hannigan and McCormick in the unit and allowed Romain to vote. I join in sustaining the challenge to Romain's vote. Unlike my colleagues and the hearing officer, however, I would also honor the parties' stipulation regarding Hannigan and McCormick.

The Board's policy must be to encourage and foster agreement among the parties regarding voter eligibility. Needless litigation must be avoided and discouraged. Certainly, if the parties for arbitrary and invidious reasons or in contravention of the statute agree to disenfranchise a voter or voters, I would refuse to honor the resulting stipulation. But I cannot conclude that that is the case here.

The parties agreed that voters Hannigan and McCormick were ineligible as casual employees. In refusing to honor the stipulation in her decision, the hearing officer, based on the record evidence, concluded that these two voters worked sufficient hours to be deemed regular part-time employees eligible to vote in the election. Although I do not quarrel with this reading of the evidence that is in the record, I cannot reject the parties' agreement as arbitrary and invidious. The parties may have had records before them—i.e., other than the payroll records in evidence—suggesting that these voters were casual employees. I do not know exactly what prompted the parties' stipulation,[1] but I see no basis for finding the stipulation improper.[2] A refusal in these circumstances to honor the parties' stipulation will discourage parties from entering into stipulations and will undermine the entire process that encourages parties to resolve issues expeditiously and without litigation.

[4] We note that the ballot of Judy Brennan was not considered by the hearing officer because her eligibility to vote will be determined by the outcome of Case 7–CA–32774(1). Similarly, the Employer's ''conditional'' objections were not considered because, pursuant to the Acting Regional Director's Order dated March 20, 1992, these matters shall be resolved subsequent to the issuance of the revised tally of ballots.

[1] As the parties had no reason to know that their stipulation would not be honored, they had no reason to explain in detail, or present further evidence regarding, the status of Hannigan and McCormick.

In my colleagues' view, the Board should not consider this factor because no party has explicitly complained that reliance on the stipulation led it to refrain from offering evidence. But, in my view, when a party contends that it has been prejudiced by a hearing officer's posthearing rejection of a stipulation, that party is suggesting that it would have proceeded differently had it been able to foretell the hearing officer's action. Indeed, in *Cabrillo Lanes*, 202 NLRB 921, 923 fn. 12 (1973), a case noted by my colleagues as one where the Board refused to accept the parties' agreement regarding voter eligibility, the hearing officer—during the hearing—refused to accept the agreement, thereby alerting the parties that the agreement might not be honored. That is not comparable to declining to honor a stipulation that has been accepted.

[2] I am certainly not persuaded by the hearing officer's reliance on *Vent Control, Inc. of Ohio*, 126 NLRB 1134 (1960). In that case, the Board, despite the parties' stipulation to the contrary, excluded a supervisor from voting eligibility. Supervisors are explicitly excluded from coverage by the Act. An issue of statutory exclusion is substantially different from an issue of whether individuals worked sufficient hours to be eligible to vote in an election.

Similarly, in *Red Lion*, 301 NLRB 33 (1991), cited by my colleagues, at issue was whether certain alleged supervisors were eligible to vote and thus the Board properly adopted a hearing officer's rejection of a stipulation with no factual basis.